IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
August 2000 Session

STATE OF TENNESSEE v. ROGER M. DEMASS

Appeal from the Circuit Court for Williamson County
No. I-1298-399 Donald P. Harris, Judge

No. M2000-0344-CCA-R3-CD - Filed August 31, 2000

The Defendant pleaded guilty in the Williamson County Circuit Court to aggravated burglary, without a sentence recommendation. After a sentencing hearing, he was sentenced as a Range I standard offender to four years incarceration, suspended after service of one year at seventy-five percent in the Williamson County Jail. He was also placed on six years supervised probation. In this appeal as of right, the Defendant argues that the trial court erred by refusing to suspend his entire sentence, that the trial court erred by ordering the Defendant to serve an amount of time greater than the percentage allowed under Tennessee Code Annotated § 40-35-314, and that the trial court erred by ordering the Defendant to pay restitution to the victim. We find no error. Accordingly, we affirm the judgment of the trial court.

Tenn. R. App. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

DAVID H. WELLES, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, J., and ROBERT W. WEDEMEYER, J., joined.

Gene Honea, Assistant Public Defender, Franklin, Tennessee, for the appellant, Roger M. Demass.

Paul G. Summers, Attorney General and Reporter; David H. Findley, Assistant Attorney General; Ron Davis, District Attorney General; and Lee Driver, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

At the sentencing hearing, the statement that the Defendant gave to the police when he was arrested for this offense was introduced as a exhibit. That statement set forth the facts giving rise to this conviction as follows:

> Oct. 19, I Roger DeMass, called in to work sick, my back was very sore, and I was not able to lift big things, and the job requires this. When everyone was gone at my house, I went for a walk, feeling aroused. I walked past a ladies [sic] house

> and thought she wasn't there, I turned the door nob [sic] of the side door and it was open. I entered the house with the thought of getting a pare [sic] of panties and leaving, but as I walked and turned on a light, I saw that the lady was there. I got scared and ran out of the house, and went back to my house.
>
> Tonight, Oct. 24th, I went for a walk, and was walking behind some houses looking for lights on to try to look in to windows. At that point two officers spotted me and started asked [sic] what I was doing. After some delay, the Holy Spirit convicted [sic] me to tell the truth, though I was deeply ashamed to tell. I was able to get it out.
>
> Side Note: I praise God those two officers saw me, this <u>is</u> the begin, [sic] finally, of a <u>perfect</u> relationship with God, instead of a half hearted relationship!

(emphasis in original). The Defendant had signed the statement, and he admitted that he made it.

At the sentencing hearing, the Defendant testified that he entered the victim's apartment to steal a pair of panties. He said that he did this because of "sexual arousal." He also said that he had "peeked" through the victim's window to observe her four or five times in the three months prior to his entry into her apartment. He had looked in windows of various women's residences approximately 112 times "for enjoyment." He did this so he could watch the women when they were partially undressed.

The Defendant testified that he lacked seven credits to complete his bachelor's degree in "youth ministry." He said that he attended church on a regular basis while growing up and that he intended to pursue a vocation in ministry. At the time of the hearing, both the Defendant and his wife were working at a Sonic restaurant. The Defendant testified that he is very sorry that he hurt the victim and that he has prayed for her. He said he has sought counseling with the pastor of his church, and he has joined an "accountability group" made up of other men from the church. He got married three or four months prior to the hearing, and his wife supports him. He was dating his wife when the offense occurred.

The victim, Violet Conley, testified that she was in her apartment sleeping when she was awakened by her closet door being opened. She sat up in bed and saw the Defendant, but was too "stunned" to say anything. She then grabbed the telephone and called 911. The Defendant fled her apartment.

Ms. Conley testified about the impact this offense has made on her life. She said that she no longer feels safe, and she is always looking over her shoulder to see if someone is "stalking" her. Because she no longer felt safe in her apartment, Ms. Conley said she was "forced" to move. She lost three days of pay because she had to look for another place to live, she incurred moving expenses, and she lost her security deposit because she had to break her lease. In her victim impact statement, which was made part of the presentence report, Ms. Conley indicated that she incurred moving expenses of $479.21, a loss of $100 for the security deposit, and a loss of three days work

at $250 per day, for a total of $750.00 This aggregates a total of $1,329.21, which is the amount of restitution ordered by the trial court.

Both the Defendant's wife and his pastor testified on his behalf at the sentencing hearing. They both testified that the Defendant has sought help through the church and that he is working through his "problem." When asked what the "problem" was, the pastor replied that it was "pornography."

The Defendant sought judicial diversion. In sentencing the Defendant, the trial judge specifically stated that he had considered the presentence report, the other exhibits entered, the testimony at the sentencing hearing, the arguments of counsel, and the principles and purposes of the Sentencing Act. Although the Defendant pleaded guilty to aggravated burglary, the trial judge found that the offense was "in the nature of sex offenses." Noting the provisions set forth by the legislature regarding the seriousness of sex crimes, the judge determined that this was not a proper case for judicial diversion.[1] He applied the following two enhancement factors: (1) that the Defendant had a previous history of criminal behavior (numerous incidents of peeping at partially-dressed women through windows of their homes) in addition to that necessary to establish the appropriate range; and (2) that the offense was committed to gratify the Defendant's desire for pleasure or excitement. See Tenn. Code Ann. § 40-35-114(1), (7). He further applied one mitigating factor: that the Defendant's conduct neither caused nor threatened serious bodily injury. See id. § 40-35-113(1).

The judge recognized that the Defendant was presumed to be a favorable candidate for alternative sentencing, but he found that some confinement was necessary to avoid depreciating the seriousness of the offense. He stated that confinement in this case would serve as deterrence to others. He then sentenced the Defendant to a term of four years and ordered split confinement, with the Defendant to serve one year at seventy-five percent in the Williamson County Jail prior to being placed on supervised probation. As a condition of probation, the Defendant was ordered to pay restitution to the victim for her losses. The Defendant now challenges the sentence imposed by the trial court, arguing that the trial court should have granted him full probation.

When an accused challenges the length, range, or manner of service of a sentence, this Court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. Id. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

When conducting a de novo review of a sentence, this Court must consider: (a) the evidence, if any, received at the trial and sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement

[1] On appeal, the Defendant does not challenge the trial judge's denial of judicial diversion.

made by the defendant regarding sentencing; and (g) the potential or lack of potential for rehabilitation or treatment. State v. Thomas, 755 S.W.2d 838, 844 (Tenn. Crim. App. 1988); Tenn. Code Ann. §§ 40-35-102, -103, -210.

If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

A defendant who "is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6). Because the Defendant was convicted of a Class C felony, he was presumed to be a favorable candidate for alternative sentencing. The Defendant does not dispute that he was afforded this presumption when granted a sentence of split confinement, but he argues that he should have been granted full probation instead.

Probation is to be automatically considered as a sentence alternative for eligible defendants; however, "'the defendant is not automatically entitled to probation as a matter of law.'" State v. Hartley, 818 S.W.2d 370, 373 (Tenn. Crim. App. 1991) (quoting Tenn. Code Ann. § 40-35-303 Sentencing Commission Comments); see also Tenn. Code Ann. § 40-35-303(b). The burden of proving suitability for probation rests with the defendant. See Tenn. Code Ann. § 40-35-303(b).

In determining whether to grant probation, the judge must consider the nature and circumstances of the offense, the defendant's criminal record, his background and social history, his present condition, including his physical and mental condition, the deterrent effect on other criminal activity, and the likelihood that probation is in the bests interests of both the public and the defendant. See Stiller v. State, 516 S.W.2d 617, 620-21 (Tenn. 1974); State v. Michael, 629 S.W.2d 13, 15 (Tenn. 1982); State v. Bonestel, 871 S.W.2d 163, 169 (Tenn. Crim. App. 1993). Denial of probation may be based entirely on the circumstances of the offense when they are of such a nature as to outweigh all other factors favoring probation. State v. Bingham, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995).

Here, the trial judge denied full probation based on his finding that a period of confinement was necessary to avoid depreciating the seriousness of the offense and to act as a deterrent. We agree with the Defendant that the trial court erred in applying general deterrence as a factor in denying probation in this case. Because deterrence is a consideration in every sentencing determination, we have repeatedly held that before a trial court may deny probation on the general ground of deterrence, there must be some evidence in the record that confinement will have a deterrent effect within the particular jurisdiction; the finding of deterrence cannot be conclusory. See State v. Davis, 940 S.W.2d 558, 560 (Tenn. 1997); Bingham, 910 S.W.2d at 455; State v. Dowdy, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994). However, we do believe that the nature and circumstances of the offense justify a period of confinement in this case. The Defendant observed

the victim in her home four or five times during the three-month period prior to the offense. He also testified that he had "peeked" in the windows of women about 112 times for enjoyment. His "peeking" culminated in his entering the victim's apartment in order to take a pair of panties because of his "sexual arousal." Even after encountering the victim in her apartment, the Defendant continued "peeking" in windows. He was "peeking" in windows when he was apprehended by the police. While the Defendant admitted that he had a "problem," he did not seek counseling until after being arrested. Requiring him to serve some jail time is justified in order to help make him realize that his continuing "sexual" conduct is not acceptable. We therefore affirm the trial court's denial of full probation.

The Defendant next asserts that the trial judge erred by ordering him to serve one year of confinement in the local jail with a seventy-five percent release eligibility. He relies on Tennessee Code Annotated § 40-35-314(b)(1), which provides, "When imposing the sentence to the local jail or workhouse, the defendant is eligible for release classification status as provided in this chapter." He then argues that because he is a Range I standard offender, he should be eligible for release after serving thirty percent of the "one-year" sentence.

We believe that the Defendant has misinterpreted the statutory provisions. The release eligibility classifications in the Code determine when an inmate is eligible for parole. See Tenn. Code Ann. § 40-35-501(a)(1). The Code provides: "Release eligibility for each defendant sentenced as a Range I standard offender shall occur after service of thirty percent (30%) of the actual sentence imposed less sentence credits earned and retained by the defendant." Id. § 40-35-501(c). The actual sentence imposed upon the Defendant was four years, not one year. If the Defendant had been ordered to serve his entire sentence in incarceration, he would have been eligible for parole in 1.2 years, or 14.4 months.

However, the Defendant was ordered to serve his four year sentence on probation following partial service of the sentence in confinement. Tennessee Code Annotated § 40-35-306(a) provides: "A defendant receiving probation may be required to serve a portion of the sentence in continuous confinement for up to one (1) year in the local jail or workhouse, with probation for a period of time up to and including the statutory maximum time for the class of the conviction offense." In accordance with this provision, the trial judge ordered the Defendant to serve one year of his four-year sentence in confinement. He further ordered that the Defendant would be eligible for release after serving seventy-five percent of that year, or nine months. Thus, the Defendant was given a lawful sentence.

Finally, the Defendant argues that the trial court erred by ordering him to pay restitution in the amount of $1,329.21 because of failure to comply with Tennessee Code Annotated § 40-35-304(b), which provides: "Whenever the court believes that restitution may be proper or the victim of the offense or the district attorney general requests, the court shall order the presentence service officer to include in the presentence report documentation regarding the nature and amount of the victim's pecuniary loss." Although this provision contains mandatory language, we have held previously that "any technical lack of compliance" with the statute is harmless if the pecuniary loss

is proven. State v. Moore, 814 S.W.2d 381, 384 (Tenn. Crim. App. 1991); see also State v. Lewis, 917 S.W.2d 251, 256 (Tenn. Crim. App. 1995). We have previously upheld the amount of restitution ordered when the victim was able to testify as to the amount of pecuniary loss. See Lewis, 917 S.W.2d at 456; Moore, 814 S.W.2d at 383-84; State v. Ralph Dewayne Moore, No. E199-00804-CCA-R3-CD, 2000 WL 204547, at *1-2 (Tenn. Crim. App., Knoxville, Feb. 23, 2000); State v. Gabriel Blackman, No. 02C01-9704-CC-00135, 1998 WL 79874, at *2 (Tenn. Crim. App., Jackson, Feb. 26, 1998) (remanding for hearing to determine amount of restitution, to be established by appropriate documentation or testimony). This Court reviews the amount of restitution awarded and its manner of computation de novo with a presumption that the determination made by the trial court is correct. State v. Johnson, 968 S.W.2d 883, 884 (Tenn. Crim. App. 1997).

Here, the presentence report indicated that Ms. Conley lost three days of work at $250.00 per day for a total of $750.00, that she lost her security deposit of $100.00 when she was forced to break her lease, and that she incurred moving expenses of $479.21. The only documentation in the presentence report was a receipt for moving expenses reflecting payment of $479.21. At the sentencing hearing, Ms. Conley testified that her loss was approximately $1,500.00, but she did not detail the amounts. She did testify that she lost three days of work, that she lost her security deposit, and that she incurred moving expenses. The Defendant attempted to challenge her testimony regarding whether the expenses were necessary, but he did not challenge the amount of loss. We conclude that Ms. Conley's testimony at the sentencing hearing, combined with the more specific list of pecuniary loss included in the presentence report, was sufficient to establish the amount of her pecuniary loss. Moreover, the Defendant failed to object to the lack of technical compliance with Tennessee Code Annotated § 40-35-304(b) at the sentencing hearing. Failure to make a contemporaneous objection waives consideration by this court of the issue on appeal. See Tenn. R. App. P. 36(a); State v. Killebrew, 760 S.W.2d 228, 235 (Tenn. Crim. App. 1988). Accordingly, we conclude that the trial court properly ordered restitution.

The judgment of the trial court is affirmed.

_____

DAVID H. WELLES, JUDGE